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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 309

LEO KUBIK AND J. C. WHITE, *Petitioners,*

against

UNITED STATES OF AMERICA, *Respondent.*

PETITIONERS' REPLY MEMORANDUM

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Petitioners seek a writ of certiorari presenting the question of whether the requirements of *Miranda* and *Escobedo*[1] are applicable to all government interrogations made in the course of official investigations seeking information to be used in a criminal prosecution of the respondent. They also seek this Court's consideration of the question of whether *Miranda* warnings are required if the Government is to rely on statements obtained from a respondent to justify a search and seizure of private property. To answer these

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[1] *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

questions, petitioners suggest a reconsideration of the Court's decision in *In re Groban,* 352 U.S. 330 (1957).

The Government has responded by filing a memorandum that fails to meet petitioners' points. In opposition to the presentation of the first question presented, it has distinguished this Court's prior decisions on the same erroneous grounds on which the Court of Appeals in the instant case attempted to avoid the implications of *Miranda* and *Escobedo.* It contends the rules of those decisions apply solely to interrogations of suspects "in custody" of the police. It has also cited in support of its views two cases that petitioners find beside the point they are making.

On the second question petitioners seek to bring before the Court, the Government does not deny its importance nor suggest the Court has answered it. Instead, the Government has merely objected to the petition by citing a memorandum the Solicitor General filed in a Miscellaneous Docket case at the end of the last Term of Court. Such short-hand cross references are an imposition on counsel for petitioners no less than on this Court.[2] It attempts to make a point of the fact that this Court has denied a writ of certiorari in an arguably comparable case, although this Court has often said that the denial of a petition for a writ

[2] It is always an imposition to require an examination of a document in an unrelated case not readily available in the offices of opposing counsel. It is a particular imposition on counsel not located in Washington to cite materials that consist of mimeographed briefs obtainable solely from the Office of the Solicitor General or, if not available there, as is not unlikely, available for examination only in the Office of the Clerk of this Court. (In the instant case, the Office of the Solicitor General furnished a copy of its earlier memorandum on request of local counsel.)

carries no more significance than that four Justices did not see fit to vote to hear that particular case at that particular time. Most important, reference to the memorandum previously filed by the Government and on which it seeks to rely here reveals only a cursory two-page argument on the significant issue these petitioners seek to bring before the Court. And, indeed in that brief, the Government concedes that

> "the need to advise a person concerning his rights under the Fourth Amendment raises discrete issues from those raised when Fifth Amendment rights are involved, . . ."[3]

But it makes no showing that those discrete issues have received consideration by this Court in the light of *Miranda*.

1. The Government's opposition to Question 1.

The first question presented by the petition suggests the Court should adopt the rule that whenever the Government seeks incriminating information from an individual, its agents must warn the respondent of (a) his right to counsel, (b) his right to remain silent, and (c) that statements made or evidence obtained as a result of his statements may be used against him in a criminal prosecution. The Government objects to that rule on the grounds that the Court's previous decisions limit the requirement of such warnings solely to situations in which the respondent is in the custody of the police or other law enforcement agencies. The petition adequately discusses the cases and commentators disputing such a narrow interpretation of the

[3] Brief for the United States in Opposition to the Granting of the Petition for a Writ of Certiorari in *Vickers* v. *United States*, No. 1187, Misc., O.T. 1967, at 4, n. 4.

Constitutional principles this Court announced in *Miranda,* and there is no need to repeat such material here.

However, the Government goes on to say that adoption of the rule the petitioners propose would conflict with the recent decisions of this Court in *Hoffa* v. *United States,* 385 U.S. 293 (1966) and *Lewis* v. *United States,* 385 U.S. 206 (1966). In those cases the Court upheld convictions obtained in part on the basis of testimony received from undercover informers who overheard and even solicited incriminating statements from the defendants.

A closer examination of the *Hoffa* case, however, shows its irrelevance to this case. The Court rejected Hoffa's Fourth Amendment claim by stating it has never "expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he *voluntarily* confides his wrongdoing will not reveal it." (emphasis supplied). 385 U.S. at 302. It rejected his Fifth Amendment claim by stating that "a necessary element of compulsory self-incrimination is some kind of compulsion . . . [and in] the present case no claim has been or could be made that the petitioner's incriminating statements were the product of any sort of coercion, legal or factual." 385 U.S. at 304. It rejected Hoffa's Sixth Amendment claims, first, on the grounds that the informer was not present when Hoffa was speaking to his lawyers—and thus, the Government did not "intrude" into the attorney-client relationship—and, second, because "there is no constitutional right to be arrested," 385 U.S. at 304, so as to bring the rule of *Escobedo* into effect as to statements made when the defendant freely spoke to an undercover, undisclosed

Government agent. Finally, the Court rejected the argument that the use of undercover informers violated Hoffa's rights to due process on the ground that historically informers have been used and their use is not unconstitutional *per se*. 285 U.S. at 311.[4]

The key to the Court's Fourth and Fifth Amendment decisions in *Hoffa* was its finding that Hoffa's statements were made *voluntarily* and that in speaking voluntarily to a person not identified as a Government informer Hoffa ran the risk that the informer would repeat the incriminating statements in court. However, in the instant case petitioners contend that a statement made to a Government agent, identified as such, can never be considered wholly "voluntary" in the Fourth and Fifth Amendment sense. When a Government agent makes himself known to a suspect, the latter is, as a practical matter—particularly if he is law abiding—not acting "voluntarily" when he responds. This is precisely what Article 31 of the Uniform Code of Military Justice recognizes by its requirement for a warning before *any* interrogation the prod-

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[4] In *Lewis* v. *United States*, 385 U.S. 206 (1966) the Court found an undercover agent's invited entry into the defendant's home for the purpose of buying narcotics no breach of the Fourth Amendment. The Court, there, accepted the Government's argument that no breach occurred since " 'the pretense [by which the agent entered] merely encouraged the suspect to say things he was willing and anxious to say to anyone who would be interested in purchasing marijuana.' " 385 U.S. at 212. There can be no claim made here that when the agents went to petitioner's premises to question him they were simply overhearing statements freely made to anyone interested in petitioner's business. The agents knew the identity of the suspect and in their official, law-enforcement capacity interrogated petitioner, thereby eliciting the incriminating statement. Whether *Miranda* warnings must be given in the circumstances of this case should not depend upon whether the interrogation began in petitioner's club, the agent's car or the cell block.

uct of which may be a criminal prosecution, whether that interrogation is conducted in or out of "custody."

The Internal Revenue Service has, itself, recognized the validity of these views by its adoption of a procedure requiring Special Agents of the Intelligence Division to read to a taxpayer under investigation a "Statement of Rights" containing the *Miranda* warnings. IRS Doc. 5661 (Rev. 11-66), cited in *United States* v. *Turzynski*, 268 F. Supp. 847, 854 (N.D. Ill. 1967).

The references in the Government's opposition to the comments of the Court in *Miranda* distinguishing "custodial" from "general on-the-scene questioning" do not answer this point. The Court was attempting, in *Miranda*, to stress that in *Escobedo* it had said that once the Government has focused on an individual as the likely suspect of a crime, it must advise him of his constitutional rights. The moment of focus is most easily ascertained when a suspect is placed in custody. But while there is no right to be arrested, as the Court said in *Hoffa*, the obligation to warn cannot be avoided because the Government chooses not to arrest.

In this case, the Government had focused on Kubik as the suspect. This was no "general on-the-scene questioning" in the sense those words were used in *Miranda*. It confronted him with the aura of authority surrounding all identified Government agents and asked him to incriminate himself. Surely if the *Miranda* rules are to be meaningful they should apply to such a case. At least the Court should give plenary consideration to the question.

2. The Government's opposition to Question 2.

The Government states that *Miranda* warnings need not be given to render a consent to a search "voluntary". Its only authority for this statement is its own mimeographed memo in *Vickers* v. *United States,* a Miscellaneous Docket case last Term in which certiorari was denied. Obviously the fact that certiorari was denied is no authority. Insofar as the memo itself is concerned, it deals with a case in which a postal employee suspected of stealing mail was asked by postal investigators if he would empty his pockets. He did so and marked money was found which was later introduced against him at his trial. He contended the investigators compelled him to empty his pockets; they claimed they asked if he would and he did because he did not realize his money included some that had been marked. The courts below held this was a "voluntary" consent to the revelation of incriminating evidence. The Government's opposition to certiorari contended that since the employee was not in custody at the time of his confrontation with his superiors, the *Miranda* warnings did not have to be given to render his consent to the revelation "voluntary."[5]

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[5] The memorandum cites for authority cases that are readily distinguishable. *United States* v. *Dornblut,* 261 F. 2d 949 (2d Cir. 1958), cert. denied, 360 U.S. 912 (1959) predates *Miranda* even if it is conceded it was correctly decided under the law prevailing in 1958. *Gorman* v. *United States,* 380 F. 2d 158 (1st Cir. 1967) deals with a case in which *Miranda* warnings *were* given at one time but were simply not repeated before consent to a search was requested. The Court held only that no separate warning was needed to render the search proper. See 380 F. 2d at 164. And in *Nikrash* v. *United States,* 367 F. 2d 740 (7th Cir. 1966) the Court actually held, "Since the arrested defendant . . . had not been apprised of his Fourth Amendment rights, . . . no true consent [to a search . . .

This argument is no more persuasive in the context of obtaining consent to a search than when incriminating statements are sought. In each case, it is based on the fallacious assumption that custody is the touchstone on which *Miranda*-type warnings are required. Petitioners do not read *Miranda* that way. In any event, the Supreme Court ought to consider the extent to which *Miranda* has an applicability to consents to searches. There may be different standards in the light of the Fourth Amendment's criterion of "unreasonable searches and seizures" and the Fifth Amendment's absolute bar on compulsory self-incrimination. But if so, this Court should so indicate. The denial of certiorari in a Miscellaneous Docket case is hardly precedential indication of the Court's considered views on the subject.

3. The Government's opposition to a reconsideration of Groban.

The Government dismisses petitioners' contention that *In re Groban* merits reconsideration with a mere footnote stating that the "confrontations" between the agent and petitioner in this case "can scarcely be deemed comparable to the administrative hearing involved in *In re Groban.*" It does not suggest why the two are "scarcely comparable." Petitioners contend they are very well comparable: in both an officer of the law confronted a person suspected of having information concerning possible criminal violations and asked questions through which incriminating information

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[was] given." 367 F. 2d at 744. See also *United States* v. *Gregory*, 204 F. Supp. 884 (S.D.N.Y. 1962) in which the court infers coercion for a consent obtained without a prior warning on the assumption no defendant would voluntarily consent to a search demanded by law enforcement officers if he was advised evidence uncovered could be used to convict him of crime.

was sought, without affording the respondent the assistance of counsel. There are obvious factual differences between the cases. The philosophical underpinnings of the appropriate rule to be applied in each are the same, however, as is suggested by the fact that the dissent in *Groban* has been cited by the majority in *Miranda* and similar cases no more comparable in underlying facts to *Groban* than the instant case.

In re Groban is a relic of another day. It deserves prompt reconsideration.[6] This case would enable the Court to undertake that needed task.

4. Conclusion

As stated in the petition: The problems this case presents are important and recurring ones. The lower courts have not uniformly followed consistent rules in resolving them. The Government has utterly failed to show why such a case is not deserving of this Court's consideration. The writ of certiorari should be granted.

Respectfully submitted,

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Washington, D. C.
September 17, 1968

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[6] Although hardly of precedential weight to the United States Supreme Court, it is of interest that the District of Columbia Court of General Sessions has recently held that *Miranda* warnings are to be given before consent to an administrative search for housing code violations will be considered "voluntary." *District of Columbia* v. *Wesley*, Washington Post, p. B4, col. 1 (August 8, 1968).